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No. 91-1039

In The

Supreme Court of the United States

October Term, 1991

Walter Fuller Aircraft Sales, Inc.,

Petitioner,

versus

Faysound Limited,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

INTRODUCTION

Respondent will show that Petitioner's proposed questions are seriously misstated and misleading; that there is no basis for the claim of conflicts in the Circuits; that the judgment below was in complete accord with the precepts of this Court; that the *Forgay* doctrine has no application to the judgment of the district court or to the question of procedure presented on appeal; and that there is no reason to find error or abuse on the part of the

[1] The parties are as identified by Petitioner. Respondent Faysound Limited has no subsidiaries and is owned by Longreach Business, S.A.

Court of Appeals in following the rules in force at the time of its judgment.

PETITIONER MISSTATES THE QUESTIONS

1. Petitioner's first question charges the Court of Appeals with an erroneous holding as to the proper content of a "notice of appeal" and is a serious misstatement intended to create the impression of a question and conflict where there is none. The Court was not referring to a proper notice of appeal, but to other documents that Petitioner urged the Court to recognize in place of it. The Court's statement was by no means a holding and, if exceptionable, no more than an inadequate expression of one of the reasons for a well-founded conclusion. There is no basis for the pretense that the Court of Appeals does not agree with Fed. R. App. P. 3(c) on the content of an actual notice of appeal.

2. A clearer and more forthright statement of Petitioner's second question would be:

> 2. Does Fed. R. App. P. 4(a)(6), effective December 1, 1991, authorizing certain relief by a district court to a party not receiving timely notice of an order, upon timely application, warrant reversal of a court of appeals judgment entered August 1, 1991, in accordance with the rules then in force?

3. Petitioner's third question should more accurately be bifurcated and stated:

> 3. a. Is a district court's declaratory judgment of title to property, without ordering a

transfer of possession or other execution, and pending decision of a motion to amend, within the doctrine of *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848); and

b. If the judgment fell within the doctrine of the *Forgay* case, would an appeal be subject to the Federal Rules of Appellate Procedure?

COUNTER-STATEMENT OF THE CASE

We restate the case because the relevant proceedings can be more simply and clearly stated than they are in the Petition.

Respondent brought suit against Petitioner for a declaratory judgment of Respondent's title to an airplane. Throughout the litigation, the airplane in contest has been, as it remains, in the hands of Falcon Jet Corporation, not a party here but a defendant below, which, in the course of proceedings, tendered the airplane by cross-claim in interpleader. Falcon Jet also claimed a lien on it for storage charges under Ark. Code Ann. § 18-45-201. The district court entered a judgment October 29, 1990, declaring that the disputed title to the airplane lay with Faysound, and denied defendant Falcon Jet's claim of a lien for storage. By virtue of Fed. R. Civ. P. 62, the judgment was not final, but was stayed for ten days, during which motions could be made under Rule 59(e) to amend it and turn it into a different, and contrary, judgment.

On November 7, 1990, however, Petitioner filed its notice of appeal. Two days later, Falcon Jet filed a timely motion, under Fed. R. Civ. P. 59(e), to amend the judgment by granting it the lien interest it claimed. Petitioner received notice of the motion and opposed it (Pet. 3) and was therefore charged with knowledge that its notice of appeal was nullified, under Fed. R. App. P. 4(a)(4). Another effect of the motion, raising as it did a claim of a security interest in the property, was to deprive the judgment of its finality, not only by definition of possible amendment but by the reassertion of conflicting claims of interest in the airplane.

On January 22, 1991, an order was entered denying the motion to amend and, under the Rules, the judgment again became final and appeal time started to run. Petitioner claims not to have received timely notice of the entry of the order. It makes no claim, however, to have performed any act relevant to the time for appeal and received "assurance by a judicial officer that this act has been properly done," so as to activate the rule of "unique circumstances."[2] Petitioner gave no new notice of appeal but treated the original notice as valid, by continued activity in the Court of Appeals.

Respondent moved to dismiss the appeal for lack of jurisdiction. In reply, in addition to points not renewed here,[3] Petitioner argued that:

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[2] *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989).

[3] Petitioner contended in the Court of Appeals that the judgment below had been a form of injunction and therefore

(Continued on following page)

1. because Fed.R. App. P. 4(a)(1) provides that a "notice of appeal mistakenly filed in the court of appeals" should be endorsed with the date of its receipt and transmitted to the clerk of the district court, where it has effect as from the endorsed date, various other papers Petitioner filed in the Court of Appeals within the appeal period should have been treated as a valid notice of appeal;

2. its notice of appeal remained valid under the doctrine of *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848), despite Rule 4(a)(4); and

3. the amendment of Fed. R. App. P. 4(a)(6), expected to come into force six months later (barring Congressional abrogation) and permitting relief to be granted by the district court, should be applied by the Court of Appeals, in conjunction with Fed. R. Civ. P. 60(a) providing for correction of clerical errors.

These arguments were held inadequate, as stated in the opinion below (Pet. App. 1).

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the notice of appeal remained valid despite Rule 4(a)(4) and that the case presented "unique circumstances," under the doctrine of *Thompson v. INS*, 375 U.S. 384 (1964) and *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989).

THERE IS NO CONFLICT OF CIRCUITS

Content of a Notice of Appeal

No doubt the Court of Appeals would have been in conflict with the Federal Rules of Appellate Procedure and decisions of this Court and others, if it had held that a real notice of appeal should designate an order on a post-judgment motion with which the appellant agreed, rather than the judgment itself, with which the appellant disagreed. But the Court of Appeals did not so hold.

There is no evidence that the Court of Appeals for the Eighth Circuit is in conflict with others on the contents of an actual notice of appeal under Fed. R. App. P. 3(c). Its true understanding is shown by its own decisions on that point, cited by Petitioner itself (Pet. 13, n. 5). And, whether or not this Court accepts the characterization, "uncompromising rigidity," quoted by Petitioner, the Court of Appeals has invented no new rule and applied none more stringent than those laid down in the Federal Rules of Appellate Procedure and the decisions of this Court.

In the words Petitioner challenges here, the Court of Appeals was addressing the problem of recognizing that a letter filed with the Court of Appeals, not entitled "notice of appeal," was intended as one, and dealing with it accordingly under the Rules. The Court stated, with perhaps excessive elision, one of its reasons for not treating such a letter as a "notice of appeal mistakenly filed in the court of appeals," which its clerk would be required to recognize as such and "note thereon the date on which it was received and transmit it to the clerk of the district court," in accordance with Fed. R. App. P. 4(a)(1). The

Court presumably had in mind that, where a notice was already of record and an appeal docketed, there was no reason for its clerk to suppose that the letter, not entitled "notice of appeal," represented such a notice, without some reference to the district court's post-judgment order (Pet. App. 38) as evidence of the need for a new notice.

The Court, farther on, clearly elaborated the point to which it had alluded. It properly rejected the notion that it had to "search through various documents in our Clerk's office, including even a letter from Fuller's counsel informing us of the lifting of a bankruptcy stay, in order to piece together the various constituent elements necessary to a proper notice of appeal" (Pet. App. 7). In such a search the clerk would have to find a post-judgment motion nullifying the original notice, and also the order deciding that motion, and discover that afterwards papers were filed that were of possible special significance because of the nullification of the actual notice. The clerk would then have to determine that those papers contained the elements of a notice of appeal and should be treated as though they constituted such a notice "mistakenly filed in the court of appeals," despite the fact that they were not entitled "notice of appeal" and were not mistakenly filed, since there was an obvious other purpose in filing them in the court of appeals.

The only sensible meaning of Fed. R. App. P. 4(a)(1) is that the document filed must be a genuine notice of appeal, so entitled, and not a document intended for another purpose in the court of appeals. Otherwise its filing there would not be mistaken and the clerk would have no inkling of his duty to transmit it to the district

court, since he would properly assume it to belong in the court of appeals, as it appeared and was in fact intended. Thus, even if a document not entitled as a notice of appeal and not in the form prescribed may possibly be treated as a notice of appeal when filed in the district court, it by no means follows that such a misleading document can be given the same effect when filed in the court of appeals, where the clerk cannot be expected to recognize the hidden significance to be given it in later argument.[4]

Petitioner relies on its counsel's letter of March 13, 1991 to the clerk of the Court of Appeals, forwarding an agreed order of the bankruptcy court. The letter (Pet. App. 47) does not contain the elements of a notice of appeal. The order itself (Pet. App. 48) refers only to the premature and invalid notice of appeal of November 7, 1990 and identifies nothing more than the continuation of the invalid proceedings to which that notice gave rise.

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[4] *See Van Wyk El Paso Investment, Inc. v. Dollar-Rent-A-Car Systems, Inc.*, 719 F.2d 806, 808 (5th Cir. 1983), where the court rejected a form of appearance of counsel and several communications with the clerk as the equivalent of a notice of appeal and said:

> We clearly cannot characterize memoranda and correspondence of the Court, which connote no more than normal developments in the course of processing a premature appeal, as the equivalent of a timely notice of appeal.

See also Alamo Chemical Transportation Co. v. M/V Overseas Valdes, 744 F.2d 22, 23 (5th Cir. 1984); *Florida Women's Medical Clinic, Inc. v. Smith*, 706 F.2d 1172 (11th Cir. 1983).

Nothing in *Foman v. Davis*, 371 U.S. 178 (1962) or *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) or *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. ___, 112 L.ed.2d 743 (1991) is in the least inconsistent with the judgment of the Court of Appeals here. In *FirsTier Mortgage*, the appellant received the benefit of a necessary interpretation of Fed. R. App. P. 4(a)(2); but the sentence of Rule 4(a)(4) involved here needs no interpretation and is susceptible of none favorable to Petitioner. The decision of the Court of Appeals is in full harmony with the decisions of this Court on notices of appeal.

The *Forgay* Decision

There are two fundamental errors in Petitioner's reliance on *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848). The case does not apply to the judgment here and does not deal with the rules of appellate procedure.

Forgay and its progeny have nothing to do with the issue here; their doctrine is one of the tests used to determine what judgments are final and appealable, where collateral issues are pending. *Forgay* itself is clear that the reason the judgment was appealable, notwithstanding the pendency of other issues, was that, "here the decree not only decides the title . . . but directs the property in dispute to be delivered to the complainant, and awards execution." 47 U.S. (6 How.) at 204.

Petitioner's own discussion (Pet. 25-26) of *In re Regency Woods Apartments, Ltd.*, 686 F.2d 899 (11th Cir. 1982), the case alleged to be in conflict, makes clear that the case completely agrees with the decision here and

with *Forgay*. The court there denied the application of *Forgay* and said that it would only apply if the court had ordered the delivery of the property[5] (at 902). With the hesitant signal, "*see also*," Petitioner also cites *Kasishke v. Baker*, 144 F.2d 384 (10th Cir. 1944); that case likewise presents no conflict, since the decree there operated as a conveyance of property on failure of the defendant to promptly execute one.

Petitioner draws the red herring of supersedeas through this topic.[6] The Court of Appeals expressly disavowed any significance to the availability of supersedeas (Pet. App. 9) and so it has nothing to do with the issue here beyond the attempt to create the illusion of conflict.

There is no doubt here that the district court's judgment would have been final and appealable if not amended, and, under Fed. R. Civ. P. 62, would have become enforceable after ten days, by appropriate proceedings, if no motion were made in that time.[7] If the

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[5] "Under the *Forgay-Conrad* rule an order is treated as final if it directs the immediate delivery of the physical property and subjects the losing party to irreparable injury if appellate review must await the outcome of the litigation."

[6] Supersedeas does not determine appealability but presupposes an appealable judgment. The rules do not provide a special or built-in stay for a *Forgay* judgment and so supersedeas is needed, and serves the same purpose, with such a judgment as with any other.

[7] *See United States v. Ibarra*, 502 U.S. ___, 116 L.ed.2d 1, 7 (1991): "[A] motion for rehearing in a criminal case, like a motion for rehearing in a civil case, renders an otherwise final decision of a district court not final until it decides the petition for rehearing."

motion to amend the judgment had been granted, the result would have been to impose a lien on the airplane, and the judgment would then have been final and appealable, in that case by Respondent as well as Petitioner. Because the motion dealt with rights in the property, it made the judgment unenforceable for practical reasons of substance as well as procedure. Since the motion was denied, the original judgment was a final judgment, subject to appeal from the date of the denial.

Petitioner's problem here does not arise from any question of the appealability of the judgment, but from the effect of the present rules, which did not exist in the days of *Forgay* and are not involved in the issue with which *Forgay* deals. Fed. R. App. P. 4(a)(4) makes no exception for judgments subject to the *Forgay* doctrine; accordingly, a motion under Fed. R. Civ. P. 59(e) interrupts the finality and appealability of such judgments. Fed. R. Civ. P. 77 also applies fully to such judgments. Nothing in the cases Petitioner cites suggests the contrary.

Accordingly, no crisis was presented with respect to transfer or possession of the property and the *Forgay* Doctrine does not apply here. And where *Forgay* does apply, it does not dispense the appellant from following the rules creating jurisdiction on appeal. The claim of a conflict in the circuits is false and can not be jacked up even to the dignity of speciousness.

IT IS NOT THE ROLE OF THIS COURT TO REVERSE OLD JUDGMENTS TO CONFORM TO NEW PROCEDURAL RULES

As of December 1, 1991, Fed. R. App. P. 4(a)(6) was amended to give a district court authority to reopen the time for a notice of appeal, on application within 180 days of the entry of the order to be appealed from, by a party who did not receive notice of its entry.

When this case came to the attention of the Court of Appeals, the district court had not taken or omitted any action under Rule 4, either as it stood at that time or as it was expected to be amended more than half a year later. The Court of Appeals therefore was not confronted with any question of error or abuse by the district court. Petitioner nevertheless asked the Court of Appeals, to whose proceedings the proposed amendment would not apply in any event, to rule in its favor on the basis of the proposed amendment. The Court was constrained to decide the case on the basis of the rules applicable to itself and in force at the time of decision. Had the amended rule been in effect and had the district court denied relief under it, the situation might have been different.

Petitioner now argues, on the ground that the amendment is now in effect, that this Court, a further step removed, should consider reversing a decision of the Court of Appeals, based on an hypothesis of what the district court might have done if it had received a motion it did not receive, under a rule not in effect when the case was before it, and still months away when the case was before the Court of Appeals.

We respectfully submit that it is not the function of this Court, on certiorari (Rule 10), or in any of its jurisdictions, to patch up old procedural errors of parties, by indulging in suppositions under the terms of rules not in effect when the parties and the courts below took their relevant actions. The courts below have not erred in following the rules by which they were governed at the time and the function of this Court to provide guidance for the future would not be advanced; the Rules have already done that.

CONCLUSION

The issues raised by Petitioner do not warrant hearing by this Court. The suggestion of Petitioner that the Court summarily reverse the judgment below is especially inappropriate; it is a plea that the Court make a capricious ruling, without the support of a citable case of this Court to support a charge of error or abuse by the Court of Appeals or to indicate what, and on what grounds, that Court should do, other than it has done.

The Petition should be denied.

Respectfully submitted,

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